DOCUMENT RESUME

ED 029 387 EA 002 237

By-Hollister, Charles A.

School Boards and the U.S. Constitution.

Pub Date Apr 69

Note-21p.; Paper presented at the Annual Session of the National School Boards Assn. (29th, Miami Beach, Florida, April 1969)

EDRS Price MF-$0.25 HC-$1.15

Descriptors-Academic Freedom, Activism, *Board of Education Policy, Censorship, Civil Rights, Conduct, Constitutional History, *Court Litigation, Discipline Policy, *Equal Education, *Freedom of Speech, Legal Responsibility, Public Officials, School District Autonomy, School Policy, *State Church Separation, State Legislation

Identifiers-Bill of Rights, First Amendment, Fourteenth Amendment, Tinker v. Des Moines Independent Community School

As public agencies created by State legislative mandate, school districts and the officers thereof are obligated to abide by several provisions of the United States Constitution. School boards can reduce many of the sources of current student unrest by complying with these provisions. Courts have held that under the Fourteenth Amendment school officials are obligated to provide due process of law and equal protection of the law to their patrons. These provisions strictly prohibit capricious, arbitrary, or unreasonable rule making and discrimination based on race, color, or economic position. Under the First Amendment the guarantees of freedom of speech and freedom of religion require school officials to recognize the student's right to speak without prior restraint, subject to penalties for abuse of that right, and requires these officials to maintain a neutral position towards religions. School officials seeking to operate their school system in a lawful, peaceful, and productive manner should be aware that as agents of the State they are subject to constitutional restraints on their authority. Such an awareness should limit the potential for turmoil stemming from decisions affecting the civil liberties of students. (JH)

ED029387

SCHOOL BOARDS AND THE U.S. CONSTITUTION*

by Charles A. Hollister

My assignment is to take cognizance of these propositions: (1) students at all age levels are showing contempt for established authority; (2) students are demanding a greater voice in school administration; (3) the AFT proposes that students be given a say in personnel selection; and (4) student unrest is a phenomenon which will increase in intensity. More specifically, I have been requested to wrestle with the question: What can school boards do to prevent or control trouble in local schools? It will be the purpose of this study, then, to offer some suggestions to school boards as they seek to cope with student protests. In other words, an attempt will be made to mention some courses of action which school boards may want to consider as they try to cope with student dismay.

Most observers of school board operations and student disorders realize that there are a number of courses of action which school boards could pursue in an effort to placate their patrons. School boards, for example, could improve their operations in the area of public reporting; community leaders could make a more determined effort to induce the best qualified citizens to serve on the school board; the high school curriculum could be made more relevant; and more emphasis could be placed on free discussion between the disputants rather than call in the police. All of these, then, constitute areas in which improvements could be made. My objective, however, is to emphasize that a major step which school boards should take is to abide by the law. By this I mean school board members should learn what their constitutional duties and obligations are and abide by these. It is axiomatic that if a school board wants to

---

*This paper was presented by the author at the 29th Annual Session of the National School Boards Association, Miami Beach, April 1969.

EA 002 237

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY.

strengthen its operations, and remain out of court, its members will need to learn the kinds of restrictions which the Constitution and laws of the United States impose on them. Therefore, my paper will be given over to an examination of what the courts have said about their duty to afford their patrons freedom of expression, of assembly, of petition, of conscience, and due process and equal treatment under the law. (In particular, school boards are obligated to recognize the proposition that the First Amendment protects the rights of public school children to express their political and social views during school hours.)[1]

As a student of public law, my first suggestion is that school boards recognize the fact that school districts are public bodies designed to serve the public.[2] The districts are quasi municipal corporations, or public corporations, created by the state government for political purposes (to provide for the educational needs of the children within the state) and they possess subordinate and local powers of legislation.[3] A school district, it has been held, is

---

[1] The American Civil Liberties Union has stated the proposition thus: If secondary school students are to become citizens trained in the democratic process, they must be given every opportunity to participate in the school and in the community with rights broadly analogous to those of adult citizens. In this basic sense, students are entitled to freedom of expression, of assembly, of petition, and of conscience, and to due process and equal treatment under the law. American Civil Liberties Union, Academic Freedom in the Secondary Schools, New York, 1968, p. 10.

[2] The Illinois law states that "The directors of each district shall be a body politic and corporate, by the name of 'school directors of district No..., county of... and State of Illinois,' and by that name may sue and be sued in all courts and places where judicial proceedings are held. Illinois Revised Statutes, 1963, ch. 122, sec. 10.

[3] The Pennsylvania Supreme Court ruled in Borough of Wilkinsburg v. School District of Wilkinsburg, 365 Pa. 254, 74 A. 2d 138 (1950) as follows: While a school district is not, of course, an independent sovereignty, it does constitute a body corporate, a quasi-municipal corporation, which is an agency of the Commonwealth for the performance of prescribed governmental functions, being created and maintained for the sole purpose of administering the Commonwealth's system of public education.....

essentially:

> A body corporate consisting of inhabitants of a designated area created by the legislature with or without the consent of such inhabitants for governmental purposes possessing local legislative and administrative power, and power to exercise within such area so much of the administrative power of the state as may be delegated to it and possessing limited capacity to own and hold property and to act in purveyance of public conveniences.[4]

To put the matter bluntly, school board members must accept the fact that school districts are public corporations organized for governmental reasons and having for most purposes the status and powers of municipal corporations but not municipal corporations proper, such as cities and incorporated towns.[5]

In their capacity as bodies politic, or as state agencies, school boards act as representatives of the people and they are endowed with important governmental powers. I am certain that most school board observers realize that school boards are charged with such responsibilities as the following:

1. To adopt and enforce all necessary rules for the management and government of the public schools of their district.
2. To visit and inspect the public schools as the good of the schools may require.
3. To appoint all teachers and fix the amount of their salaries.
4. To direct what branches of study shall be taught, and what textbooks and apparatus shall be used.[6]

These are, of course, significant grants of authority and the manner in which they are wielded will greatly affect the fashion in which our public school system functions. If these authorizations are exercised in an intelligent way, the ability of our teachers and students to face up to, and resolve, the issues of our time will be greatly enhanced. Also, the fashion in which school

---

[4]Sutter v. Milwaukee Board of Fire Underwriters, 161 Wis. 615, N.W. 127 Ann. Ca. 1917 E. 682.

[5]Plumbing Supply Company v. Board of Education of Independent School District of City of Canton, 32 S. D. 270, 142 N.W. 1131, 1132.

[6]Illinois Revised Statutes op. cit., ch. 10, secs. 205-208.

boards exercise these powers will be highly determinative of whether we have cooperative or uncooperative students.

In passing, I would like to call this legal principle to the attention of school board members: In the performance of these, and the other duties which are imposed upon them by law, the school directors must not lose sight of the fact that all the district's power, rights and privileges are conferred upon it as a trustee for the public welfare and these grants are subject to the legislative power of the state, within the limits of the state constitution.[7] Within the sphere assured to the district by the code, however, it is an independent corporate entity.

As a public agency, it should now be noted that the school district, and the officers thereof, are obligated to abide by the provisions of the Fourteenth Amendment of the United States Constitution. It is incumbent upon all board members to realize that this Amendment, which defines citizenship, lays important new restrictions upon the states (and the creatures thereof) pertaining to interstate citizenship, due process of law, and equal protection of the law. School boards, it should be emphasized, must provide the public due process of law, equal protection of the law, and the privileges and immunities of United States citizens. And it is my humble opinion that school boards can reduce student dissatisfaction with our social, economic and political system by recognizing that the requirement to comply with these constitutional obligations can be met only when they are willing to recognize that these concepts have been analyzed thus:

(1) Due process of law: This is to the effect that the public is to be protected against school district decisions which may deprive them of life, liberty and property in an arbitrary unreasonable, or capricious manner.

---

[7]The Oklahoma Supreme Court stated this rule thus in Board of Education of Oklahoma City v. Cloudman, 185 Okl. 400, 92 P. 2d 837 (1939): The school board has and can exercise those powers that are granted in express words, those fairly implied in or necessarily incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation.

(2) Equal protection of the law: This requirement is to the effect that state laws (or school district rules and regulations) may not arbitrarily discriminate against persons.

(3) Privileges and Immunities: The privileges and immunities clause is basically an instrument of civil liberties, placing certain restrictions upon each state in its dealings with United States citizens.

It would seem to me that the ability of school boards to wrestle with student disturbances will be stronger when they realize that it is now recognized that protection against arbitrary treatment by public authorities is basic to the American system of government and equal protection of law emanates from the democratic concepts of the equality of men under the law and their right to equality of opportunity. In short, it must be accepted, that arbitrary, or irrelevant, barriers to the full enjoyment of certain rights are forbidden.

The obligation of members of the school district governing body to concern themselves about the provisions of the Fourteenth Amendment was stated in West Virginia Board of Education v. Barnette,[8] in this manner:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--BOARDS OF EDUCATION NOT EXCEPTED.[9] These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of the constitutional freedom of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

In essence, board members as public officials, are asking for trouble when they blind themselves to the fact that they are obligated to abide

---

[8] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[9] Emphasis supplied.

by that provision of the constitution which has become, in the hands of the Supreme Court, a very copious source of limitations on the states.

I urge school board members to become actively concerned about the due process of law requirement. They should bear in mind that this guarantee has also been defined thus:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social impact which defines the rights of the individual and delimits the powers which the State may exercise.[10]

They should not lose sight of the fact that it is the due process of law requirement which provides that the public is not to be treated in an arbitrary, capricious, and unreasonable fashion.

Those who are responsible for our system of public education should be acutely aware of the fact that when they discipline a student, or a faculty member, they are required to proceed in a fixed manner. More specifically, as school boards seek to develop ways and means of dealing with dissidents, I would plead with them to comply with the due process of law requirement in this fashion. First the dissident(s), who may be liable for penalties, must be notified a reasonable time in advance of the hearing as to just what the school board intends to prove against him. This allows the accused to prepare his defense against specific charges. Second, the accused person(s) must be allowed to be represented by someone of his own choosing. Third, he must be allowed to cross-examine witnesses against him and be given power to compel the attendance of witnesses in his behalf. Fourth, an impartial body must hear the evidence on both sides and make a finding or facts. Finally, if, in the dissident's opinion, any of the elements of a fair trial has been denied or the law improperly applied to the facts, the dissident(s) must be allowed to appeal until he does obtain fair trial. It may be assumed that a determination to abide by these procedures will generate more light than heat and the chances of obtaining an amicable resolution of differences should be greater.

---

[10] Re-Gault, 387 U.S. 1 (1967)

The "equal protection of the law" provision of the Fourteenth Amendment should also be of marked interest to school board members. This portion of the Amendment forbids states to make "unreasonable" and "arbitrary" classifications; but it does not rule out "reasonable" classifications that affect alike all persons similarly situated and that have some relation to permissible ends.

Our concern about abiding by the provisions of the "equal protection of the law" requirement emanates from the decision of the United States Supreme Court in the Brown v. Board of Education of Topeka,[11] at which time the jurists ruled:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

Furthermore, in Cooper v. Aaron,[12] the High Court asserted that "...community opposition, even violent protest, does not justify delaying public school desegregation. The constitutional rights of children not to be discriminated against in school admission on grounds of race or color...can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted ingeniously or ingenuously."

One may conclude that the best ways and means for school boards to avoid difficulties in the "equal protection of the law area," and to eliminate controversies which might arise from a failure to abide by the guarantee, is to assume that constitutions, statutes, ordinances and other kinds of directives made by public authorities are "color blind." This proposition was well formulated by Justice Harlan in the Plessy v. Ferguson[13]

---

[11] 347 U.S. 483 (1954).

[12] 358 U.S. 1 (1958).

[13] 163 U.S. 537 (1896).

controversy when he said:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

A determination by school board members to abide by this kind of thinking may enable them to prevent dissension from arising and to afford ameliorative action when dissension cannot be avoided.

Thus far it has been emphasized that one method by which school boards can prevent, or control, trouble in local schools is to scrupously abide by the provisions of the Fourteenth Amendment. However, as these bodies concern themselves about this Amendment, they will discover it compels them to abide by most of the provisions of the Federal Bill of Rights. In short, the Supreme Court has ruled that an effect of the Fourteenth Amendment is to nationalize most of the contents of the Federal Bill of Rights and thus make these enforceable against practically all public bodies or agencies. It was in the Gitlow[14] controversy, for example, that the Supreme Court observed: For present purposes we may and do assume that freedom of speech, of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the state..." The Gitlow proceeding has been followed by other Supreme Court rulings with the result that today, as has been noted, public officers must abide by most of the provisions of the First Ten Amendments

---

[14] Gitlow v. New York, 268, U.S. 652 (1925).

to the United States Constitution.[15]

Of the First Ten Amendments which, again, on the whole, have been made enforceable against the states, it is the First Amendment that will be of particular concern to school boards. This Amendment, which is directed specifically to Congress, has now, as a result of the manner in which the Fourteenth Amendment has been interpreted, been made applicable to the states. The restrictions of the First Amendment are: Congress shall make no law respecting an establishment of religion, or abridging the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

In many areas, school board actions and decisions have given rise to student "break-ins, lie-ins, and smash-ins"[16] because they fail to obey the mandate of the First Amendment. On numerous occasions, school officials have disregarded the provisions of the Amendment with the result that students, and parents, have seen fit to protest.

---

[15]Two authorities have described the nationalization of the Bill of Rights in this manner. "After the adoption of the Fourteenth Amendment, which does apply to state (and local) governments, the Supreme Court was urged to construe the Amendment, especially its due process clause, as applying to the states the same limitations that the Bill of Rights applies to the national government. The Supreme Court did read the amendment to prevent state regulation of property in a manner that the justices thought to be unreasonable. The Court also brought within the due process clause a provision of the Bill of Rights forbidding the taking of private property without just compensation, but for decades it refused to take the momentous step of holding that the word 'liberty' in the due process clause of the Fourteenth Amendment includes liberty of speech. By the early 1940's the Supreme Court had incorporated within the due process clause all of the provisions of the First Amendment. In short, by construction of the Fourteenth Amendment, the major substantive restrictions that the Bill of Rights placed on the national government in order to protect freedom of religion, speech, press, petition, and assembly were given national constitutional protection against abridgment by state and local authorities." Edward S. Corwin and Jack W. Peltason, Understanding the Constitution, 4th edition, Holt, Rinehart and Winston, New York, 1967, pp. 105-106.

[16]From the dissenting opinion of Mr. Justice Black in Tinker v. Des Moines Independent Community School System. O.T. 69 (no page assigned yet).

Those associated with the public school system operations are, I am certain, aware of the controversy over prayer reading in the public schools. Controversial as the decisions may be, the fact remains that the Supreme Court has ruled that such activities deny a right secured by the Constitution of the United States to the people. Some readers will recall that in two major controversies[17] our highest court has held that public school prayers and bible reading (as opposed to bible studying) are inimical to the First Amendment. In both proceedings, the Court exhibited this kind of thinking:

> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relief upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is TOO PERSONAL, TOO SACRED, TOO HOLY,[18] to permit its 'unhallowed perversion' by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[19]

When it comes to the matter of prayers and bible reading in the public school system, school board members might avoid controversy by acting on the principle that if the purpose of a public religion rule is the advancement or inhibition of religion, then the rule exceeds the scope of legislative power as circumscribed by the Constitution.[20]

---

[17] Engle v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963).

[18] Emphasis supplied.

[19] Engle v. Vitale, op. cit.

[20] The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. Abington School District v. Schempp, op. cit.

School boards often create controversy, too, when they seek to provide assistance to private and parochial schools. It often happens, for example, that school boards, in an effort to strengthen our system of public education, will offer free textbooks, free bus transportation, free lunches, and free medical service to all school children. In many instances, these actions have been sustained on the benefit theory: that is, the public aid to school children does not aid a religion, it aids the child. Thus, in Everson v. Board of Education[21] the majority members of the court held that the decision of a school board to reimburse the parents of children attending private schools for certain transportation costs, did not violate the First Amendment. It was concluded that it is not a violation of the First Amendment's establishment of religion clause for a state to pay for the transportation of children to parochial schools. The Court found this to be a benefit to the children rather than an aid to the church.

One may now conclude that school boards can circumvent public anger in the religious field by adhering to these propositions: The First Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. Public bodies are no more to be used as to handicap religions than they are to favor them.

Many school boards have brought the wrath of the disaffected down upon themselves by their failure to abide by that provision of the First Amendment, which provides that public bodies shall not abridge the freedom of speech. This provision of the First Amendment, which has been interpreted to secure to people the right to speak without prior restraint, subject to penalties for abuse of the right, is predicated on the belief that freedom is impossible

---

[21] Everson v. Board of Education, 330 U.S. 1 (1947).

without the right to disseminate ideas. Generally, the courts have treated the guarantee liberally; the evidence is to the effect that our federal courts have concluded that the right of freedom of speech is essential to the preservation and operation of democracy, but even this right is not absolute.

In the area of free speech, I would emphasize that school boards should bear in mind that ideas can be disseminated by many different ways other than the utterance of words. An individual can express an idea by the manner in which he dresses, the type of hair style which he prefers, his determination to be silent on occasion, or his decision to protest by marching or rioting, his facial expression, etc. All these actions--and other kinds--constitute ways of communicating and all of them are subject to protection by our government. These kinds of actions constitute freedom of speech, and unless they violate some concept such as the following, they are to be protected against arbitrary action by public officials: (1) the clear and present danger rule, (2) the balancing of interest rule in which the court must, "in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression,"[22] or (3) the absolutist position which holds that the First Amendment means literally what it says--that Congress shall make no law which has the effect of limiting, or reducing in compass, freedom of speech and press.

Symbolic speech[23] which includes tones, inflections, posture, and

---

[22]Thomas I. Emerson, "Toward a General Theory of the First Amendment," 72 Yale Journal 877 (1963); Toward a General Theory of the First Amendment Random House, Inc., New York, 1966, pp. 53-54.

[23]School board members should take cognizance of the fact that speech is a code made up of the visible and audible symbols which one person uses to stir up ideas and feelings in other persons without the use of any means other than voice and visible bodily actions. In BASIC PRINCIPLES OF SPEECH, the authors make this statementabout symbolic speech: Since the essence of a symbol is its meaning, not its physical substance, anything can be used as a symbol: flags, torches, the beat of tom-toms, shapes, colors, movements, pieces of metal or paper--anything at all. Gold, silver, cooper, paper bills, and bank checks symbolize goods and services, but their value depends entirely upon agreement among the people using them. The world of symbols, then, is made up of rituals and ceremonies, flags and emblems, paintings, and sculpture, ornaments and shrines; but most especially, it is made up of language. Alma Johnson Sarrett, the Late Lew Sarett and the Late William Trufant Foster, BASIC PRINCIPLES OF SPEECH, 4th ed. Houghton Mifflin Co., Boston, 1966, pp. 178-179.

gesture, then, is a kind of expression which is entitled to First Amendment protection. The concern of the United States Supreme Court about this kind of speech evidences itself in the West Virginia Board of Education v. Barnette[24] proceeding in which the court ruled:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

The High Court's concern about symbolic speech--or one kind of response which is made in place of another kind of response--should be of real interest to school board members. The finding of the jurists that the "...action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our constitution to reserve from all local control..." is one which local government officials can ignore only at their own peril.

In the recent controversy of Breen v. Kahl,[25] Judge Doyle observed that "Whether wearing one's hair at a certain length or wearing a beard is a form of constitutionally protected expression is not a simple question. Unquestionably, it is an expression of individuality, and it may be, although the record

---

[24] Op. cit.

[25] In Breen v. Kahl, 68-C-201, Judge Doyle concluded that the defendants had failed to show that the distraction caused by male high school students whose hair length exceeds the Board standard is so aggravated, so frequent, so general and so persistent that this invasion of their individual freedom by state is warranted.

in this case is silent on the subject, that the manner in which many younger people now wear their hair is an expression of a cultural revolt." The Judge did note, however, that "If, for adults, wearing one's hair at a certain length or wearing a beard is viewed in part as a form of expression, that is, as a 'course of conduct' in which 'speech' and 'nonspeech' elements are combined, 'only a' sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."

The obligation of school boards to refrain from violating symbolic speech was emphasized by the United States Supreme Court in the case of Tinker v. Des Moines Independent Community School District.[26] This case arose in December 1965 when a group of pacifist-minded citizens decided to publicize their objections to the Vietnam war by wearing black armbands during the Christmas season. School principals, aware of the plan, met in mid-December and barred the practice of wearing black armbands. The principals adopted a policy that students refusing to remove the armbands would be suspended from school. In reversing that policy, the Supreme Court said that the demonstration amounted to symbolic speech that was protected by the First Amendment so long as it did not intrude on others.[27] The

---

[26] Op. cit.

[27] It should be noted that no classes were suspended or interrupted by the black armband students. The evidence indicates that the students were forbidden to wear armbands because some authorities felt that schools are no place for demonstrations. But political campaign buttons and even Nazi symbols were not forbidden--only the symbol of opposition to the current war.

In a newspaper article entitled, "Kids Are People", David N. Ellenhorn makes these comments about the Tinker decision: Affirmation of students' First Amendment rights is, of course, the most significant aspect of the decision. Another potentially significant aspect of the decision is the Court's treatment of the 'symbolic speech' issue. When the Supreme Court upheld David O'Brien's conviction for draft card burning last year, it brought into question the doctrine of 'symbolic speech,' pointing out that not every form of conduct which purports to express an idea is protected by the First Amendment. But, in upholding the right of the students to express their views by wearing armbands in school, the Court said, without elaboration, that such a form of expression 'is exactly the type of symbolic act that is within the Free Speech Clause of the First Amendment.' Tinker thus makes it clear that symbolic forms of speech will continue to be protected by the Court as long as the symbolic conduct does not interfere with legitimate and substantial state interests. Civil Liberties, Monthly Publication of the American Civil Liberties Union, Number 261, April, 1969.

fact that school authorities acted out of fear that the protest might cause a disturbance was insufficient to justify a curb on speech, the Court said. In speaking for the majority, Justice Fortas reminded school officials, and others, that "Our constitution says we must take this risk of chancing disturbance in the name of free expression." The majority members of the Court also observed that the actions of the Des Moines school officials appeared to stem from an urgent wish to avoid controversy rather than on evidence that the protest would interfere with school work.

The Tinker Case also contains an admonition to school officials which, again, if they wish to avoid difficulty, should be heeded. The admonition reads as follows:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."

It should be borne in mind that the right of students to freedom of expression follows them to the cafeteria, the playing field and the campus during "authorized" hours. The court opinion said nothing is wrong with actions that cause discussion outside the classrooms--as the black armband wearers did--so long as there is "no interference with work" in the classrooms and "no disorder."

One can only hope that school officials will view the Tinker finding in this fashion:

> Freedom of expression--in an open manner by those holding minority or unpopular views--
> is part of the strength and vigor of our society. So long as it does not obstruct the right of others in the classrooms or on campus,

> it must be allowed in this country. If dissent ever has to go undergound America will be in real trouble.[28]

To recapitulate, in essence, the Tinker proceeding means that students have a constitutional right to peaceful free expression during school hours that may not be abridged by school officials fearful of controversy.

School boards across the country have adopted one kind of dress code after another. These codes, which are designed to prevent disruptive influences or factors within the school, are defended as a proper exercise of the authority conferred upon them by the school code. While the value of these codes is problematical, I would suggest that those school districts seeking to avoid turmoil, should, as they adopt the codes, abide by these rules in the formulation of them: (1) a government regulation (a school board order) is sufficiently justified if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[29] It would appear that a school board that disregards these principles would be opening the proverbial Pandora's box of evils.

There is still another development which school boards that seek to impose behavioral controls must be wary of lest they be taken to court. The new development concerns itself about the manner in which the courts will measure the relationship between the Civil Rights Act of 1876 as amended and

---

[28] Editorial, New York Times, Tuesday, February 26, 1969.

[29] See United States v. O'Brien, 391 U.S. 367.

the actions of public bodies and agencies.[30] The 1876 Act provides thus:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state of Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisidiction thereof to the deprivation of any rights, privileges, or immunitied secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In essence, the issue to be resolved, is this: To what extent can school boards be held liable for denying students and parents of rights, privileges, and immunities secured to them by the Constitution and laws of the United States.

I submit that school boards that are actively concerned about the maintainance of law and order and that are seeking in inculcate a sense of love and loyalty to the school system on the part of students and others should study these court findings:

> (1) Color of law, it has been held, does not mean actual law. "Color as a modifier in legal parlance means appearance as distinguished from reality. "Color of law" means mere semblance of a legal right.[31] Furthermore, it has been decided that misuse of rights law is action taken under "color of law" within civil rights statute.
>
> (2) The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged under color of State law and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.[32]

For those who may be concerned as to what obligations are imposed by the Civil Rights Act, I suggest you read the decision of an Arkansas Federal

---

[30] Title 42, United States Code Annotated, section 1983.

[31] Screws v. U.S., 140 F. 2d 562.

[32] Marshall v. Sawyer, 301 F. 2d 639.

District Court in the case of H. BRENT DAVIS v. BOARD OF TRUSTEES OF ARKANSAS A & M COLLEGE.[33] At this time it was concluded that:

> When a college board of governors, or college presidents, exceed their lawful authority as representatives of public institutions of higher learning and wrongfully dismiss a teacher (or otherwise disregard the requirements of the due process of law) in violation of the Constitution of the United States, or the laws made in pursuance thereof, they are divested of their official capacity as agents of the state and they become liable for their wrongdoing.

It is patent, I believe, that a decision by the courts to determine the validity of school board rules and regulations about pupils on the basis of the Civil Rights statutes will give rise to a number of new problems. School boards would do well to proceed cautiously.

A perusal of student outbreaks--and particularly on the secondary level--prompts one to conclude that in many instances the disturbances arise from the needless censorship rules and regulations which many school boards maintain. One encounters situation after situation in which our young people are denied the right to see this or read that: it does not require too much effort to unearth cases in which the young have been unnecessarily forbidden permission to engage in this kind of activity or to pursue that kind of action.

Certainly I am very much aware of the obligation of school officials to develop certain kinds of characteristics among minors and to encourage them to adhere to certain kinds of principles and practices but I do believe that we ask for trouble when we maintain improper kinds of controls. We should never lose sight of the fact that high school students, in particular, are curious--they are eager to explore and to innovate. They are bundles of energy and they are ready, willing, and able to challenge.

For a school board to maintain irrelevant and immaterial forms of censorship is to give rise to discontent and dissatisfaction. It is

---

[33]No. 524--O.T. 68, 393 U.S. (no page assigned yet).

my humble opinion that before a school board decides to impose censorship, it may want to give thought to Justice Stewart's dissent in Ginzburg v. United States.[34] In this particular controversy, the Jurist said:

> Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself....

A determination to defend these kinds of sentiments would go far towards reducing student unhappiness and disgruntlement about school boards which, in the minds of many students, are long, narrow and hard.

Again, to create student enthusiasm and develop orderly behavior, school boards should not shy away from controversial teachers and different curriculums. We should not hesitate to be bold and imaginative and, under no circumstances, should we refrain from seeking new solutions to old problems.[35]

---

[34] Ginzburg v. United States, 383 U.S. 463.

[35] In his, "Investing in Better Schools," AGENDA FOR THE NATION, Kermit Gordon, Editor, The Brookings Institution, Washington D.C. pp. 214-215, Ralph W. Tyler makes these observations: One factor standing in the way is the tradition that the high school should be an adolescent island outside the major currents of adult life. Modern society has increasingly isolated adolescents from the adult world. Yet this is the time of life in which young people are looking forward to being independent adults; they need opportunities to work with adults, to learn adult skills and practices, and to feel that they are becoming mature and independent. Hence, the restrictions on youth employment, the limited opportunities to learn occupational skills at home, the aggregation of civil and social activities by age groupings, all add to the difficulty of the adolescent and increase his anxiety about attaining adult status and competence. The secondary school should help to bridge this gap.

Unless school boards become venturesome and imaginative, students are going to attack the system--or, as they put it, the establishment. A school board that is loathe to be creative in its practices and policies and maintains a system of anti-freedom of speech and press regulations creates that kind of classroom situation deplored by Justice Douglas in the Adler case[36] where he asserted:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supiness and dogmatism take the place of inquiry. A 'party line'--as dangerous as the 'party line' of the Communists--lays hold. It is the 'party line' of the Orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should be begun.

It was Justice Douglas' belief that this is the kind of situation develops where the censor looks over a teacher's shoulders. He also observed that a "system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom." He urged that those concerned about our system of education be "bold and adventuresome in our thinking to survive." As public officials you should not lose sight of these propositions which were submitted by the Jurist:

> (1) A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.
>
> (2) The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is freed, when ideas may be pursued whenever they lead.

---

[36] Adler v. Board of Education, 342 U.S. 485 (1952).

In this report I have described the duty and responsibility of school board members, as public officials, to abide by the provisions of the Fourteenth Amendment and the First Amendment as it has been made applicable to the state and its creatures. It has been emphasized that these officials are obligated to provide due process of law and equal protection of the law to their patrons.and, furthermore, they must observe the freedom of religion and freedom of speech guarantees of the First Amendment. One may conclude that the willingness of these officials to refrain from acting in a capricious, arbitrary and unreasonable manner, their determination not to discriminate against people because of race or color or economic position, their decision to enforce the rule that the free exercise of religion and the separation of church and state are essential, and their conviction that the right to speak without prior restraint, subject to penalties for the abuse of the right, should enable them to operate the public school system in a lawful, peaceful, and productive manner.